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In the Supreme Court of the United States

OCTOBER TERM, 1986

GLORIA A. IRVIN
SENIOR AIRMAN, UNITED STATES AIR FORCE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

EDWARD F. RODRIGUEZ, JR.,
Lt Colonel, USAFR
Office of The Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, D.C. 20332-6128
(202) 767-1562
Counsel of Record

and

MICHAEL D. WIMS,
Lt Colonel, USAF
Associate Appellate Defense Counsel
Office of The Judge Advocate General
United States Air Force

ALEXANDER S. NICHOLAS,
Major, USAFR
Office of The Judge Advocate General
United States Air Force

JOHN V. SULLIVAN,
Captain, USAFR
Office of The Judge Advocate General
United States Air Force

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QUESTIONS PRESENTED

1. Whether in a child abuse prosecution federal and military rules of evidence permit medical opinion testimony that the injuries were inflicted by the child's caretaker without justifiable excuse and further that the child suffered from battered child syndrome?

2. Whether prior to trial a military prosecutor has a duty under *United States v. Agurs* and *Brady v. Maryland* to disclose evidence in his possession of an inculpatory statement by a person other than the accused in a prosecution in which the evidence against the accused is only circumstantial?

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Gloria A. Irvin, respectfully prays that a writ of certiorari issue to review the final order of the United States Court of Military Appeals entered in this proceeding on June 9, 1986.

OPINIONS BELOW

The initial opinion of the Court of Military Appeals is reported at 21 M.J. 184 (C.M.A. 1986) (Appendix A). The final order of the Court of Military Appeals is reported at ____ M.J. ____ (C.M.A. 1986) (Appendix B). The initial opinion of the Air Force Court of Military Review is reported at 13 M.J. 749 (A.F.C.M.R. 1982) (Appendix C). The opinion upon further review of the Air Force Court of Military Review is reported at 22 M.J. 559 (A.F.C.M.R. 1986) (Appendix D).

JURISDICTION

The final order of the Court of Military Appeals was entered on June 9, 1986. The order affirmed the decision upon further review of the Air Force Court of Military Review

which dismissed a charge of assault but which nonetheless found the sentence appropriate for the one remaining charge of manslaughter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259.

STATUTES INVOLVED

Colorado defines child abuse as including any

> . . . skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hemotoma, soft tissue swelling, or death, and such condition or death is not justifiably explained. . . .

Colo. Rev. Stats. § 19-10-103(i)(a)(I).

The Manual for Courts-Martial provides in pertinent part that while a prosecutor's

> . . . primary duty is to prosecute, any act such as the conscious suppression of evidence favorable to the defense, inconsistent with a genuine desire to have the whole truth revealed, is prohibited.

M.C.M., 1969 (Rev. ed.), paragraph 44g(1).

STATEMENT OF THE CASE

In October 1979, the Denver Department of Social Services placed Margaret Cox for adoption in the home of Sergeant Charles Irvin and his wife Senior Airman Gloria A. Irvin. The Irvins resided in quarters on Lowry Air Force Base, Colorado. At the time, Margaret was nearly two years old. She was a normal, healthy child.

During the Irvins' duty hours, a neighbor, Sheila Gray, regularly took care of Margaret. Prior to December 12, 1979, Gray noticed various bruises on Margaret – a black eye, a bruise above the navel and one on her right ear. However, by December 12, 1979, the bruises had healed, except for one on her left eyebrow.

On December 12, 1979, after her duty hours, Airman Irvin picked Margaret up at the Grays' between 4:00 p.m. and 4:30 p.m. Later, just before 6:00 p.m., Airman Irvin returned to the Grays' quarters carrying Margaret in her arms. Airman

Irvin left Margaret with Gray's husband, Sergeant Gray, while she went to get the car. Sergeant Gray noticed that Margaret was limp, breathing erratically, appeared to be unconscious, had a fresh bruise on her collar bone and splotches on her face.[1]

Airman Irvin drove to the Lowry Air Force Base Clinic with Margaret arriving at approximately 6:05 p.m. Upon arrival, Margaret was unconscious, her eyes were fixed and her pupils were dilated and she was having trouble breathing. There were extensive bruises on her body, on the left shoulder, the right thigh, above the left eyebrow. There were cuts on her lips and blood in her mouth and throat which had to be suctioned out. There was a large subdural hematoma on the rear of her skull. Her blood pressure was unreadable and pulse shallow.

After about five minutes at the Lowry Clinic, it was determined that Margaret's condition was critical, requiring hospitalization and extensive treatment. At approximately 6:20 p.m., she was taken by ambulance to a nearby civilian hospital, where she remained unconscious and did not respond to any stimulus.

Later in the evening, Margaret was transferred to another civilian hospital for a CAT scan to determine the extent of her head injuries.

After two days, Margaret's condition continued to deteriorate. On December 14, 1979, Margaret was declared dead due to brain damage and her respirator was disconnected.

Margaret's autopsy revealed numerous bruises and other external marks, some of which were caused by medical intervention, in addition to the principal head injury.

As a result of the events of December 12, 1979, Airman Irvin was charged with three offenses; Margaret's murder under Article 118 of the Uniform Code of Military Justice; child abuse under the Colorado statutes as assimulated by the United States Code (18 U.S.C. 13) and charged under Article

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[1] Airman Irvin's husband, Sergeant Irvin, may have been present in their quarters the afternoon of December 12, 1979, from 4:50 p.m. to 5:10 p.m., to change clothes.

134 of the Uniform Code of Military Justice and the assault and battery of Margaret under Article 128 of the Uniform Code of Military Justice. The child abuse and assault and battery were alleged to have occurred between October 18 and December 12, 1979.

Airman Irvin was tried by general court-martial held over seventeen days in November and December 1980. She pleaded not guilty to all three charges, but was found guilty of the child abuse and assault and battery charges. As for the murder charge, Airman Irvin was found guilty of the lesser included offense of involuntary manslaughter under Article 119 of the Uniform Code of Military Justice.

At the conclusion of her court-martial, Airman Irvin was sentenced to be dishonorably discharged from the Air Force, to be confined at hard labor for four years, to forfeit $400.00 of her pay per month for four years, and to be reduced to the lowest enlisted grade. Following post-trial review, the convening authority reduced the forfeiture to $334.00 per month. The convening authority otherwise approved the sentence.

To the Air Force Court of Military Review, Airman Irvin's appellate defense counsel assigned ten errors. The first two attacked the competency of certain expert testimony. The next three concerned evidentiary issues. Errors six and seven presented constitutional issues and nine and ten related to the use of the Assimilative Crimes Act (18 U.S.C. 13).

The Court of Military Review held that all errors, save one, were without merit. The Court did find that the military judge during the court-martial had erred by admitting into evidence a copy of the Colorado child abuse statute. The sentence was reassessed in light of this error. The sentence to confinement at hard labor was reduced by one year (Appendix C).

Thereafter, Airman Irvin petitioned the United States Court of Military Appeals for review. Review was granted on two errors.

The first error questioned whether under the Military Rules of Evidence, a physician should have been permitted to opine that Margaret had been physically abused by a caretaker and that Margaret had suffered from battered child syndrome.

Secondly, the Court of Military Appeals granted review of an error concerning whether the applicability of the Assimilative Crime Act could be proved without evidence or judicial notice at trial or on appeal.

The United States Court of Military Appeals issued its opinion on January 13, 1986 (Appendix A). The court held that the applicability of the Assimilative Crimes Act could only be established by evidence at trial or by judicial notice on appeal.

The Court of Military Appeals went on to address another aspect of the applicability of the Assimilative Crimes Act. Assuming *arguendo* that the government had proven by evidence or judicial notice that the child abuse had occurred at a place under exclusive or concurrent federal jurisdiction, the court held that nevertheless the findings of guilty as to the child abuse charges could not be affirmed. This conclusion was based upon the close relationship between the assault and child abuse charges.

It was noted that defense counsel had unsuccessfully moved before trial for dismissal of the child abuse charge on the grounds that it had been preempted by federal criminal statutes. The same argument had been advanced both before the Air Force Court of Military Review and in the petition for grant of review to the United States Court of Military Appeals.

The Court of Military Appeals found that the conviction for child abuse under the Colorado child abuse law could not stand. The court reasoned that the Assimilative Crimes Act served only to fill the gaps that would exist in the federal criminal law. The Act, the Court of Military Appeals held, could not be used to apply a unique local criminal law to conduct already covered by a federal criminal law, in this case a specific punitive article of the Uniform Code of Military Justice.

Since the child abuse of which Airman Irvin had been convicted consisted of assault and not one of the other forms of child abuse covered by the Colorado law,[2] the Court of

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[2] Such as placing a child in a life or health-threatening situation, exposing a child to inclement weather or depriving a child of food, clothing or shelter.

Military Appeals held that recourse to the Assimilative Crimes Act through Article 134 of the Uniform Code of Military Justice was not necessary, since Airman Irvin's conduct clearly fell within the scope of Article 128 of the Uniform Code of Military Justice, which prohibited assault.

The Court of Military Appeals took the opportunity to also scrutinize the staff judge advocate's post-trial review. The court found that the staff judge advocate had concluded that there was insufficient evidence to establish child abuse by assault prior to December 12, 1979, i.e. during the period October 18 to December 11, 1979, but thereafter the review failed to recommend to the convening authority that he disapprove that part of the findings. Next, the court reasoned that if this conclusion of the staff judge advocate had been accepted, then Airman Irvin would have been convicted of only involuntary manslaughter by means of a fatal assault occurring on December 12, 1979, and child abuse consisting of assault also on December 12, 1979. The manslaughter (by assault) then would encompass the child abuse (by assault).

The second issue upon which the Court of Military Appeals had granted review concerned certain medical opinion testimony. The court held that the testimony established that only Airman Irvin could have inflicted Margaret's injuries while Margaret was in her care and that the circumstantial evidence was inconsistent with any other explanation of Margaret's death and injuries. The court held that the admission of this testimony was not prejudicial.

In light of matters discussed in the Court of Military Appeals' opinion the case was returned to The Judge Advocate General of the Air Force for further review by the Air Force Court of Military Review.

Immediately after the Court of Military Appeals' decision was issued, Airman Irvin's appellate defense counsel moved the court to retain jurisdiction over the case so that it may be reviewed by the Supreme Court of the United States by writ of certiorari pursuant to 28 U.S.C. 1259(3).

The Court of Military Appeals granted the motion and amended its decision to read that following further review by the Air Force, the record would be returned to it for final disposition.

On April 17, 1986, the Air Force Court of Military Review concluded its re-review and issued its decision upon further review (Appendix D). In keeping with the observations of the Court of Military Appeals, the Court of Military Review found that there was insufficient evidence to convict Airman Irvin of any assaults during the period October 18 to December 11, 1979. The Court of Military Review held that the effect of this finding was that the offense of assault on December 12, 1979, and the manslaughter offense also on December 12, 1979, merged because the evidence to prove both was the same, and one was the lesser-included offense of the other.

The remedy was to dismiss the lesser offense which the Court of Military Review did. The sentence was reassessed but was found to be still appropriate. The case was then returned to the Court of Military Appeals for its final disposition.

The Court of Military Appeals, on June 6, 1986, issued its final order (Appendix B) which affirmed the decision of the Air Force Court of Military Review.

The appellate process to date has resulted in only Airman Irvin's manslaughter conviction remaining for further review.

REASONS FOR GRANTING THE WRIT

QUESTION ONE

The Court of Military Appeals upheld the admission of the testimony challenged here, relying summarily on a number of state court decisions in this area. No cases were cited. The Air Force Court of Military Review cited state cases which have held that medical testimony on Battered Child Syndrome is admissible. Not one of those courts, including now the Air Force Court of Military Review and the United States Court of Military Appeals, has undertaken a thorough analysis of that testimony and its asserted scientific basis.

It is the duty of an appellate court to probe the basis of a field of expertise to determine the scientific, and, in this case, legal validity of the opinions offered by the experts. It is an abrogation of that duty to reason, as has been done thus far

in this case, that doctors among themselves recognize this child abuse field, and that doctors are special; therefore, their opinions in this area are admissible in criminal trials for child abuse. In fact, there are features of this child abuse branch of pediatrics which make it unique among medical subjects and which make it uniquely inappropriate for use in a criminal court.

The medical study of child abuse results from and is tailored to an investigative requirement laid upon the medical profession by the legislatures of the various states. *See* M. Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation,* 67 Colum. L. Rev. 1 (1967). The legislatures are undoubtedly motivated by the knowledge that infant victims cannot complain for themselves and that doctors are among those who are most likely to encounter child abuse while intervention and therapy can still be helpful. *See generally* Paulsen, *supra;* Brown, Fox & Hubbard, *Medical and Legal Aspects of the Battered Child Syndrome,* 50 Chi.- Kent L.Rev. 45 (1973).

The statute requires doctors to investigate the causes of injuries to children when they are encountered and to report suspicious cases to public authorities. To overcome predictable resistance from the medical profession, certain incentives are included: doctors are shielded from tort liability for erroneous reports unless they are intentionally falsified; it becomes an offense for a doctor to withhold a report when suspicion is reasonably indicated; and the doctor who improperly fails to make a report is subjected to civil liability for damage caused by his failure to report. It is no wonder that doctors have paid close attention to this subject.

The legislature has created, albeit for a laudable purpose, a complex of forces all of which push in the same direction. Any doctor confronted with any injured child minimizes his own legal risk when he makes a "diagnosis" of child abuse. The only articulable risk to the doctor who reports suspected child abuse is the risk of losing patients, a risk which is utterly immaterial to hospital or government physicians.

The Colorado statute further prescribes an investigative method which, in refined form, was described and used by the

doctors who testified in this trial. The statute defines child abuse as including, *inter alia,* cases when a child has any "skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling, or death, *and such condition or death is not justifiably explained.*" Colo. Rev. Stats. § 19-10-103 (1)(a)(I) [Emphasis added]. A doctor is thus required to seek an explanation for virtually any injury and determine, according to his own standard, whether it be justifiable. That is an investigative procedure. Its purpose is not to aid in medical diagnosis of the injury but to determine, as a deputy of the sovereign, whether there has been child abuse. That is a legal conclusion.

The "diagnostic" process described by the witnesses here is essentially the following: (1) observe an injury to a child; (2) obtain an explanation from any available source as to the occurrence of the injury; (3) compare the injury with the explanation for consistency; and (4) if inconsistent, the "diagnosis" is child abuse. Medical expertise is helpful at step (3) of the process, but, viewed as a whole, it is a forensic process analogous to a trial but without the benefit of any evidentiary safeguards.

The practical effect of the reporting requirement with its built-in incentives is to cause a doctor who encounters an injured child to *assume* child abuse unless the contrary appears. The law mandates a mini-trial in the doctor's office in which the burden of proving no child abuse is on the parent.

It is this environment within which the medical profession had developed its expertise in the field of child abuse. The medical literature identifying and describing the Battered Child Syndrome exists precisely as a self-justification of the *investigative* duty in this area imposed upon doctors by state legislatures. Doctors do not speak the language of investigators. They say "take a history" and "diagnose" in place of "interrogate" and "investigate." They say "accidental" in place of "justified." The medical community should not be faulted for that. It is not the duty of doctors but of judges to recognize that when a doctor diagnoses child abuse he or she is performing a legally required investigative function. The

judge, not the doctor, must perceive that the medical terms "child abuse" and "Battered Child Syndrome" belong not to the criminal statute supporting this prosecution but to the reporting statute which commands doctors to investigate. Doctors' reports of child abuse are reports of investigation, not diagnoses. It is then also the duty of judges to see that the rights of accused persons in criminal trials are not sacrificed to an illusion of expertise where in fact there is none.

The appropriate method for determining the evidentiary value of medical child abuse testimony in a military court is to be found in federal case law on expert testimony, not in the state authorities cited below. Article 36, U.C.M.J.; 10 U.S.C. § 836. The identity between Mil. R. Evid. 701-705 and Fed. R. Evid. 701-705, particularly in view of Article 36, *supra*, shows beyond doubt that federal law applies in this area. The Court of Military Review, by its sole reliance on state authorities, pointedly failed to approach the issue from the right direction.

The most comprehensive judicial analysis of Fed. R. Evid. 701-705 appears in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F.Supp. 1313 (E.D. Pa. 1980) (hereinafter cited as *Zenith Radio*). In that case Judge Becker held that the federal rules impose definite limits on the permissible scope of expert opinion when those opinions are formed according to the same analytical process required of the factfinder. *See Zenith Radio, supra*, 505 F.Supp. at 1331. *Zenith Radio* is an antitrust case. The expert testimony at issue there was from business economists and related to the existence of trade conspiracies within the Japanese television industry. The court held that when an expert reaches the point of sifting through the evidence and telling the jury what result to reach he impermissibly invades the province of the factfinder; such opinions are not allowed under Fed. R. Evid. 702. 505 F.Supp. at 1342.

In *Zenith Radio* a business economist sought to conclude from the existence and behavior of a collection of trade associations in Japan that there existed among the members of those associations a pattern of concerted action designed to elevate product prices in Japan while depressing prices of

exports. The court found the expert left the field of economics and entered the field of "conspiracyology," engaging thereby in the oath-helping of an earlier day. 505 F.Supp. at 1342.[3] By an analogous process of reasoning the doctors in this case who opined that the child was afflicted with the Battered Child Syndrome, meaning that she had been physically abused in a culpable manner by her caretaker, left the field of medicine and became oath-helping childabuseologists.

Suppose, as an example, that a mansion has burned down under suspicious circumstances, and the butler is on trial for arson. A police detective takes the witness stand and tells the jury: "We have seen this kind of thing many times in the past, and people in my field have done a lot of studies on it. Our studies indicate that in cases like this the fires in all likelihood are set intentionally by servants." That would be the testimony of an arsonologist. When the doctors' testimony here is shorn of its medical jargon it is precisely analogous to the arson hypothetical. It is childabuseology, not medicine. The juror in a criminal case is as able as the doctor to examine the evidence and assess culpability.

Sooner or later there must be a limit placed upon "expert" opinions. This is the case in which to do it.

QUESTION TWO

Dr. Pamela McBog testified briefly for the prosecution as an expert witness in the field of child development. R. 1248. She had worked with Margaret a year prior to her death. Dr. McBog's testimony concerned the motor development and general characteristics of the child during that early period.

After trial the defense learned that Dr. McBog had also attended the child's funeral along with one of the child's earlier foster parents. At the funeral she heard a black man utter the words, "Oh my God, I killed her, I killed her." The prosecution

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[3] We recognize that the holding concerning that evidentiary issue was reversed by the United States Court of Appeals for the Third Circuit. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 319 (3d Cir. 1983) *rev'd on other grounds Matsushita Elec. Indus. Co. v. Zenith Radio*, ___ U.S. ___, 106 S.Ct. 1348 (1986). However, the analogy used by the district court is still a good one.

was aware of this information prior to trial and had followed up on it by questioning other persons who were at the funeral and attempting to identify the author of the statement. R. *DuBay*[4] hrg. App. Ex. X. Prior to trial the defense had made a request for, *inter alia,* "[a]ny evidence of any exculpatory nature, or which would tend to negate the alleged guilt of the accused." R. *DuBay* hrg. App. Ex. XI.

The Supreme Court has established the constitutional boundaries of the prosecutor's duty to disclose information favorable to the defense in *Brady v. Maryland,* 373 U.S. 83 (1963), and *United States v. Agurs,* 427 U.S. 97 (1975). *Brady* establishes a fundamental duty to disclose favorable information on request, and *Agurs* refines and explains the duty when the defense request is either absent or nonspecific. Under *Agurs* there is no due process violation when there is a nonspecific request from the defense unless the information withheld "creates a reasonable doubt that did not otherwise exist." 427 U.S. at 112.

Paragraph 44*g*(1) of the Manual for Courts-Martial (1969 Rev. ed.) states in part:

> Although . . . [the prosecutor's] primary duty is to prosecute, any act such as the conscious suppression of evidence favorable to the defense, inconsistent with a genuine desire to have the whole truth revealed, is prohibited.

The Court of Military Review has observed that paragraph 44*g* of the Manual, *supra,* imposes a duty on military prosecutors to disclose information favorable to the defense that is higher than the minimum constitutional requirement. In *United States v. Killebrew,* 9 M.J. 154 (C.M.A. 1980), Chief Judge Everett said:

> Military law has been more liberal than its civilian counterpart in disclosing the government's case to the accused and in granting discovery rights.
>
> * * *
>
> [W]e cannot take as conclusive the prosecutor's representation about the nonexistence of favorable evidence for

[4] *United States v. DuBay,* 17 U.S.C.M.A. 147, 37 C.M.R 411 (1967). A *DuBay* hearing is a post-trial evidentiary hearing ordered by an appellate court or a convening authority.

> the accused. *However well-intentioned, prosecutors are at a disadvantage in determining what evidence will aid an accused's cause.*

9 M.J. at 159, 162. [emphasis added.]

In the present case there is a convergence of the due process rights of the accused under *Brady* and *Agurs, supra,* and the duty imposed by paragraph 44*g*(1) of the Manual, *supra,* upon the trial counsel (i.e. prosecutor) not to knowingly withhold information from the defense when it is inconsistent with a genuine desire to have the whole truth revealed. Although the judge found here that the prosecution's suppression of the statement, "Oh, my God, I killed her, I killed her" was nonmalicious, it is abundantly clear that it was *conscious.* Judge Kastl of the Air Force Court of Military Review, dissenting below, after discussing *Brady, Agurs,* and paragraph 44*g*(1), found reversible error:

> [T]his factual situation comes tantalizingly close to meeting the *Brady–Agurs* test. [Footnote omitted.] Even if the facts technically do not meet that threshold, the liberal procedures of military discovery nonetheless mandate a new trial since the accused was denied the broad and traditional discovery routinely recognized in the military.

United States v. Irvin, 13 M.J. 749, 757 (A.F.C.M.R. 1982) (Kastl, J., dissenting) (Appendix C).

Even without consideration of the manual provision, the information suppressed by the prosecution was constitutionally material under *Brady* and *Agurs. Agurs* requires that the evidentiary impact of the undisclosed material be measured against other evidence already in the case:

> [T]he omission must be evaluated in the context of the entire record. [Footnote omitted.] If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

United States v. Agurs, 427 U.S. 97, 112-113 (1975).

The evaluation required by *Agurs* cannot be conducted in a vacuum without some consideration of what would have happened at trial if there had been no suppression. The entire course of the defense in this case would have been altered had the prosecution disclosed what it had. Military defense counsel summarized it very well during an evidentiary hearing:

> Had the defense been aware of this utterance at the funeral, or of this information concerning an utterance at the funeral, much would have changed in its approach to the theory of defense at trial. Until you have corroboration for pointing a finger at an alternate suspect, you don't point a finger at an alternate suspect. But certainly this inculpatory utterance by someone obviously not the accused at the funeral of the victim raises the question of an alternate suspect defense.
>
> Had this question been raised, the defense (a) would not have had – or would not have allowed – the accused's spouse to sit behind the defense table in the first row of the gallery during trial. We would not have allowed him to ostensibly show moral support for our client; (b) the defense would not have allowed the partial alibi to go unattacked, and it did go unattacked, and I emphasize that it was partial alibi. It covered a half an hour or an hour or a 40-minute period.
>
> And finally, and most importantly, concerning the alternate suspect angle, the defense may well have sought to get immunity for Charles Irvin, so that they could interview him, so that they could see whether they wanted to call him as a witness. Other factors aside from the alternate suspect approach would have changed. The medical testimony might not have been attacked in the way that it was. The offering of statements by Charles Irvin under 804(b)(3), the statement against interest exception to the hearsay rule, would not have been opposed.[5] And

[5] Numerous statements of Charles Irvin relating to disciplinary methods he and the accused had employed were offered by the government but suppressed in the face of defense objection. R. 836-837.

> numerous factors that I cannot enumerate for the court now due to the privilege between client and attorney would have changed. (R. *DuBay* Hrg. 30)

In view of the circumstantial character of the other evidence in this case, particularly with the doubtful competence of much of it,[6] a reasonable doubt would have been raised had the prosecution fulfilled its duty of disclosure.[7] Again military defense counsel argued:

> The [prosecution] case in the trial proper was a circumstantial one. There was no eyewitness to the crime. There was no direct testimony. There were volumes of evidence, but it was a circumstantial case, and it was proved inferentially. The circumstantial evidence tended to establish through inference that crimes were perpetrated against Margaret Cox by one or the other of her adoptive parents. Given that, and given a partial alibi for the adoptive father, these inferences were directed against Airman Irvin, the adoptive mother.
>
> Given this state of affairs, the circumstantial case tending to indicate that "A" or "B" perpetrated a crime, and a partial alibi for "A" tending to focus the inferences against "B", evidence that someone other than "B" made an inculpatory utterance at the funeral of the victim is certainly constitutional[ly] material under [*Brady* and *Agurs*]. Therefore the failure of the prosecution to disclose evidence in its hands concerning this utterance deprived Airman Irvin of the right to a fair trial. (R. *DuBay* Hrg. 26-27.)

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[6] *See* question I, *supra.*

[7] This case is easily distinguishable from *United States v. Horsey,* 6 M.J. 112 (C.M.A. 1979), a robbery case in which accused's defense at trial was alibi and mistaken identification by the victims. Three eyewitnesses other than the victims identified the accused at trial as the perpetrator. This court found no error in nondisclosure of the result of an alleged pretrial photo display to the victims in the face of the other independent identifications of the accused. *Horsey* was thus a *de minimis* situation where the defense sought specific material prior to trial, the prosecutors apparently did all they could to produce it. There was ample independent direct evidence, and the missing material would not have altered the course of defense.

When paragraph 44*g*(1) of the Manual, *supra*, is added to the analysis the answer is even more apparent. Two Justices dissented in *Agurs* because of their belief that prosecutorial integrity should be a factor in the constitutional analysis. They felt that a higher duty should be imposed when information helpful to the defense is knowingly withheld by the prosecutor than in cases where it is later discovered from a neutral source. *United States v. Agurs*, 427 U.S. 97, 114 (1976) (Marshall, joined by Brennan, JJ, dissenting).

The President, by means of paragraph 44*g*(1), has adopted the dissenters' view. Moreover, there is no issue under the Manual of prosecutorial *motive*, only of prosecutorial *consciousness*. Here the judge found that the prosecutor's motive was not malicious, but it is abundantly clear that the suppression was conscious. The only remedy, as Judge Kastl concluded, is a new trial.

CONCLUSION

Petitioner submits that her petition for a writ of certiorari should be granted in order to fully air the important evidentiary and constitutional questions raised by this case.

Respectfully submitted,

EDWARD F. RODRIGUEZ, JR.,
Lt Colonel, USAFR
Office of The Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, D.C. 20332-6128
(202) 767-1562
Counsel of Record

and

MICHAEL D. WIMS,
Lt Colonel, USAF
Associate Appellate Defense Counsel
Office of The Judge Advocate General
United States Air Force

ALEXANDER S. NICHOLAS,
Major, USAFR
Office of The Judge Advocate General
United States Air Force

JOHN V. SULLIVAN,
Captain, USAFR
Office of The Judge Advocate General
United States Air Force

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 44221
ACM 23269

UNITED STATES, APPELLEE,

v.

GLORIA A. IRVIN
SENIOR AIRMAN, UNITED STATES AIR FORCE,
APPELLANT.

January 13, 1986

For Appellant: *Major Alexander S. Nicholas* (argued); *Colonel George R. Stevens* (on brief).

For Appellee: *Captain Joseph S. Kistler* (argued); *Colonel Kenneth R. Rengert, Lieutenant Colonel William H. Seckinger* (USAFR), *Major George D. Cato* (on brief).

OPINION OF THE COURT

EVERETT, Chief Judge:

On October 18, 1979, the Denver Department of Social Services placed a two-year-old child, Margaret Cox, for adoption in the home of appellant and her husband, who were both servicemembers and resided at Lowry Air Force Base, Colorado. As a result of Margaret's death two months later, appellant was charged with her murder,[1] assaults on her "at

[1] See Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918. The specification alleges that appellant

> did, at Lowry Air Force Base, Colorado, on or about 12 December 1979, murder Margaret Cox, also known as Adriann J. Irvin, by means of: Hitting her in the head with an unknown instrument or by exerting force upon her in such a manner as to cause her to strike her head.

times from on or about 18 October 1979 to on or about 12 December 1979,"[2] and child abuse over this same period. The child abuse alleged to contravene "Section 18-6-401, Colorado Revised Statutes, 1973, as amended, as assimilated by" the Assimilative Crimes Act, 18 U.S.C. § 13, which, in turn, was incorporated by the "crimes and offenses not capital" clause of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934.[3]

Contrary to appellant's pleas, a general court-martial convicted her of involuntary manslaughter by exceptions and substitutions[4] and otherwise found her guilty as charged. The court-martial sentenced Irvin to a dishonorable discharge, confinement at hard labor and forfeiture of $400.00 pay per month for 4 years, and reduction to the grade of E-1. Apart from reducing the forfeiture to $334.00 pay per month, the convening authority approved the findings and sentence. The Court of Military Review, 13 M.J. 749 (A.F.C.M.R. 1982), determined that the military judge had

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[2] These assaults were alleged in this specification as a violation of Article 128, UCMJ, 10 U.S.C. § 928. The specification alleged that appellant

> did, at Lowry Air Force Base, Colorado, at divers times from on or about 18 October 1979 to on or about 12 December 1979, unlawfully strike Margaret Cox, also known as Adriann J. Irvin, a child under the age of sixteen years, on the head, face, back, chest, buttocks and legs, with her hands and an unknown object, and on the leg with a comb.

[3] The child abuse specification alleged that appellant

> did at Lowry Air Force Base, Colorado, . . . unlawfully, knowingly, feloniously, intentionally, and negligently, and without justifiable excuse, cause and permit a child, namely Margaret Cox, also known as Adriann J. Irvin, to be placed in a situation that may endanger the child's life and health; and further, did cause and permit the child to be tortured and cruelly punished, and as a result thereof, said child suffered serious bodily injury and death; and that, such conduct was of a nature to bring discredit upon the armed forces.

[4] The words substituted for the word "murder" were "while perpetrating an offense directly affecting the person of Margaret Cox . . . to wit: assault and battery, unlawfully kill."

miscomputed the maximum sentence imposable for the child-abuse offense. Because of this and a related error, it reassessed the sentence and reduced the confinement to 3 years but upheld the findings and the remainder of the sentence as approved by the convening authority.

This Court granted review[5] to determine WHETHER THE APPLICABILITY OF THE ASSIMILATIVE CRIMES ACT CAN BE ESTABLISHED WITHOUT EVIDENCE OR JUDICIAL NOTICE EITHER AT TRIAL OR ON APPEAL.

I

For areas "under the exclusive or concurrent jurisdiction" of the United States, the Assimilative Crimes Act incorporates the penal laws of the State in which that area is located. *See United States v. Perry*, 12 M.J. 112 (C.M.A.1981); *United States v. Rowe*, 13 U.S.C.M.A. 302, 32 C.M.R. 302 (1962).[6] However, this Act cannot be invoked with respect to crimes committed in places which – although they may be owned by the United States – are not subject to its "exclusive or concurrent jurisdiction." *United States v. Perry, supra.* The creation of such "jurisdiction requires the consent of the State where the installation is located, and, without that consent, the possession by the United States is

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[5] The Court also granted review on this evidentiary issue:

WHETHER, IN A PROSECUTION OF A PARENT FOR CHILD ABUSE, THE MILITARY RULES OF EVIDENCE PERMIT PHYSICIANS' OPINION TESTIMONY THAT THE ALLEGED VICTIM WAS PHYSICALLY ABUSED BY A CARETAKER WITHOUT JUSTIFIABLE EXCUSE, AND THAT THE VICTIM WAS AFFLICTED WITH THE BATTERED CHILD SYNDROME.

However, briefs were not requested on this issue, and oral argument did not take place thereon.

[6] The process of incorporation is subject to some limitations. *See United States v. Picotte*, 12 U.S.C.M.A. 196, 30 C.M.R. 196 (1961); *see also Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946); *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 64 S.Ct. 622, 88 L.Ed. 814 (1944).

'simply that of an ordinary proprietor.' " Moreover, at least since 1940, "it must be established not only that the State involved ceded jurisdiction but also that the United States accepted the cession." *United States v. Williams,* 17 M.J. 207, 212 (C.M.A.1984).

Appellant complains that the Government failed to establish applicability of the Assimilative Crimes Act because no evidence was offered that the United States had ever acquired "exclusive or concurrent jurisdiction" over her residence at Lowry Air Force Base – where the alleged child abuse took place. The Government does not contest the lack of evidence as to Federal jurisdiction but seeks to rectify that omission by means of judicial notice.

Appellate government counsel contend that the trial judge implicitly took judicial notice that Lowry Air Force Base was subject to the exclusive jurisdiction of the United States; indeed, that was the basis of the opinion below. 13 M.J. at 754. In this regard, reliance is placed on the language of a written motion to dismiss all charges filed by the defense counsel and of a response thereto by trial counsel. At that time, apparently both counsel believed that exclusive Federal jurisdiction existed over the Base. However, when the motion was considered at an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session before trial, the military judge made no comment indicating that he was taking judicial notice of Lowry's jurisdictional status. Furthermore, when later he instructed the court members on findings, the judge specifically advised them of the facts of which he had taken judicial notice and the facts as to which the parties had stipulated; but he said nothing about "exclusive or concurrent [Federal] jurisdiction." Under these circumstances, we cannot agree with the Court of Military Review that judicial notice of an essential element was taken "by implication." Moreover, we disagree with the court below that defense counsel "conceded the specific applicability of the Assimilative Crimes Act at trial," 13 M.J. at 754; and, in any event, we believe that for such a concession appellant's express or implied concurrence should have been made a matter of record.

In the Court of Military Review, the Government requested that judicial notice be taken of the existence of Federal juris-

diction over Lowry Air Force Base and filed various documents in support of that request. On the premise that the military judge had already taken judicial notice, as indicated above, the court below found it unnecessary to determine whether it could properly take judicial notice of this matter. Now, the Government asks that we judicially notice the existence of Federal jurisdiction over the situs of the alleged crime.

Although the Military Rules of Evidence do not specifically authorize this Court to take judicial notice, *see* Mil.R.Evid. 201, we have no doubt that it is within our power to do so in a proper case. *See United States v. Williams, supra.* However, if we take judicial notice of a factual matter at the appellate level in a case which, as here, was tried before court members, we are depriving the accused of an important right guaranteed by the Uniform Code and by Mil.R. Evid. 201(g). *See United States v. Williams, supra.* Therefore, in *Williams*, we declined to take judicial notice of Federal jurisdiction over a particular location where a kidnapping had occurred at Fort Hood, Texas.

Of course, *Williams* differs from this case in that, there, a *DuBay*[7] hearing conducted by a military judge had demonstrated that part of Fort Hood was not subject to Federal jurisdiction, but nothing in the present record excludes the possibility that all of Lowry Air Force Base is subject to Federal jurisdiction. However, this record does not show beyond "reasonable dispute" that Lowry Air Force Base is subject to "exclusive or concurrent [Federal] jurisdiction," *see* Mil.R.Evid 201(b); and so this Court should not take judicial notice as to such jurisdiction.

The Government suggests that a *DuBay* hearing now be ordered, wherein a military judge could determine the jurisdictional status of appellant's residence at Lowry Air Force Base. *United States v. Mead*, 16 M.J. 270 (C.M.A.1983), provides an analogy, for there a convening authority ordered a revision proceeding at which the military judge who had presided at the trial took judicial notice of the

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[7] *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

Navy regulation on which the Government's case was predicated. However, in *Mead* the accused had not been tried by court members; and so he could not complain that the revision proceeding had deprived him of the right for court members to consider, pursuant to proper instructions, the fact judicially noticed by the judge. *See* Mil.R.Evid. 201(g).

Admittedly, in *Williams*, we initially ordered the *DuBay* hearing, even though the accused had been tried by court members. 14 M.J. 428 (C.M.A.1983). However, that hearing was ordered at a time before this Court had thoroughly considered the implications of Mil.R.Evid. 201(g) and had become fully aware of the complexity of determining the existence of Federal jurisdiction as to some place on a military installation. Indeed, the results of that hearing in *Williams* were helpful in alerting us to the problems latent in determining the extent of Federal jurisdiction over military installations.

Therefore, even though, upon a proper showing, the military judge at trial might have judicially noticed that the appellant's residence was in an area subject to "exclusive or concurrent [Federal] jurisdiction," *see* Mil.R.Evid. 201(c), we do not believe that now the Government's failure to establish such jurisdiction may be rectified by a *DuBay* hearing.[8]

II

Even if the Government proved at trial that "exclusive or concurrent [Federal] jurisdiction" existed over the place

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[8] Perhaps a procedure could be utilized under which a case is remanded to a court-martial with members for the sole purpose of making a finding as to the specific issue of which the military judge is taking judicial notice. Generally, the prosecution is not allowed a second chance to prove an element of the offense which has been overlooked at trial. *Cf. Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Whether that principal would apply in this situation, we need not determine. However, our decision in *United States v. Mead*, 16 M.J. 270 (C.M.A.1983), would seem to imply that even after the conclusion of the original trial, the Government may be allowed to demonstrate the existence of facts which are subject to judicial notice.

where the child abuse occurred, the findings of guilty under the Assimilative Crimes Act could not be affirmed. Our conclusion in this regard is based on the close relationship here between the child-abuse charge and the assault charge.

This relationship led defense counsel to move unsuccessfully before trial that the child-abuse charge be dismissed on grounds of preemption by Federal criminal statutes. Subsequently, appellant advanced the same contentions before the Court of Military Review and in the petition for review filed in this Court. In this connection, he properly relied on the premise that the Assimilative Crimes Act is intended to fill gaps that would otherwise exist in Federal criminal law, rather than to allow a redefining of crimes prescribed by Congress. *United States v. Wright,* 5 M.J. 106 (C.M.A.1978); *United States v. Butler,* 541 F.2d 730 (8th Cir.1976).

This, in *Williams v. United States,* 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946) the Supreme Court refused to allow use of the Assimilative Crimes Act to permit Federal prosecution under an Arizona statute for a sexual offense that had occurred on an Indian reservation in that State. Federal criminal statutes defining adultery and carnal knowledge applied generally to the type of conduct involved; but they differed from the Arizona Code. For example, the age of consent was sixteen years under Federal law and eighteen under the Arizona statute; and there were differences in the authorized punishments.

As the Supreme Court pointed out, the history of the Assimilative Crimes Act reveals that it was enacted.

> to cover crimes on which Congress had not legislated and did not suggest that the Act was to enlarge or otherwise amend definitions of crimes already contained in the Federal Code.
>
> As to the particular offense involved in this case, the legislative history shows an increasing purpose by Congress to cover rape and all related offenses fully with penal legislation. In the Federal Crimes Act of 1825, 4 Stat 115, rape was prohibited and made punishable only within certain areas under the admiralty and maritime jurisdiction of the United States. In the same Act, the assimilative crimes section was applied to federal

> enclaves. It thus provided the original federal prohibition of such conduct in those areas. If Congress had been satisfied to continue to apply local law to this and related offenses it would have been simple for it to have left the offense to the Assimilative Crimes Act. A contrary intent of Congress has been made obvious. Congress repeatedly has increased its list of specific prohibitions of related offenses and has enlarged the areas within which those prohibitions are applicable. It has covered the field with uniform federal legislation affecting areas within the jurisdiction of Congress.

327 U.S. at 723-24, 66 S.Ct. a 784-85 (footnotes omitted).

As we understand *Williams v. United States, supra,* it does not alter the principle that, where two Federal penal statutes apply to the same conduct, the prosecutor may choose to proceed under the statute which authorizes the more severe punishment. *United States v. Batchelder,* 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979). Indeed, in some instances he may proceed under both statutes and obtain consecutive sentences. *Albernaz v. United States,* 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). However, he is not allowed to utilize the Assimilative Crimes Act as a means to apply local law which differs from Federal criminal statutes applicable to the same conduct. If the penalties under the Federal statutes are too light, the remedy is for Congress to increase those penalties, rather than for prosecutors to attempt to invoke more severe sanctions that may be available under local law.

Williams v. United States, supra, applies fully to cases tried by court-martial. *See United States v. Picotte,* 12 U.S.C.M.A. 196, 30 C.M.R. 196 (1961); *United States v. Price,* 32 C.M.R. 812, 827 (A.F.B.R.1962). Therefore, a servicemember cannot be prosecuted under the Assimilative Crimes Act, as incorporated in Article 134, for conduct which clearly falls within the purview of a specific punitive article of the Uniform Code.

Although appellant claims that Article 128 of the Uniform Code, 10 U.S.C. § 928, which prohibits assaults, precludes use of the Assimilative Crimes Act to incorporate the Col-

orado child-abuse law, it appears that Article 128 would not punish many acts or omissions contravening this law. Section 18-6-401 of the Criminal Code of Colorado provides:

> (1) A person commits child abuse if he knowingly, intentionally, or negligently, and without justifiable excuse, causes or permits a child to be:
>
> (a) Placed in a situation that may endanger the child's life or health; or
>
> (b) Exposed to the inclemency of the weather; or
>
> (c) Abandoned, tortured, cruelly confined, or cruelly punished; or
>
> (d) Deprived of necessary food, clothing, or shelter.
>
> * * * * * *
>
> (7) Child abuse is a class 2 misdemeanor, but if it results in serious bodily injury to the child, it is a class 3 felony.

Thus, depriving a child of food and water for several days or leaving him outside in a snowstorm may be child abuse under Colorado law but would not constitute an assault under military law.

In this case, the charge of child abuse contains allegations of misconduct by Irvin that go beyond the scope of article 128. Consequently, we have no disagreement with the trial judge's denial of the defense motion to dismiss the charge of child abuse on grounds of preemption. However, after all the evidence was in, it became clear that the child abuse for which appellant was being prosecuted consisted of her assaults on the two-year-old child, Margaret Cox. Other than for such assaults, no child abuse was proved.

Under the Table of Maximum Punishments, the maximum confinement authorized for assault and battery on a child is 2 years; and the maximum is 5 years' confinement for an assault in which grievous bodily harm is intentionally inflicted. *See* Table of Maximum Punishments, para. 127 *c*, Manual for Courts-Martial, United States, 1969 (Revised edition). However, for the child abuse – consisting solely of assaults – the military judge concluded that the maximum punishment was 8 years' confinement – the maximum allowed for this offense under the assimilated Colorado statute. Thus, the conviction of child abuse was deemed to permit imposing

(a) more than four times the maximum punishment authorized by the Manual for assault and battery on a child; or (b) substantially more than that authorized for an assault wherein grievous bodily harm is intentionally inflicted.

Because the child abuse consisted of assaults, this result conflicts with the principal of *Williams v. United States, supra,* that the Assimilative Crimes Act cannot be utilized to redefine existing Federal offenses or to enlarge the punishments authorized for them. Perhaps the penalties authorized by the President for assaults on children are too lenient; but, if this be true, the situation must be corrected by a Manual change, rather than by invoking State law pursuant to the Assimilative Crimes Act. Accordingly, the findings of guilty rendered under that Act cannot stand.

III

Because we cannot sustain the conviction of child abuse as a violation of the Assimilative Crimes Act pursuant to the third clause of Article 134, the Government urges us to look elsewhere in that Article for authority to do so. In this connection, appellate government counsel call to our attention that the military judge advised the court members that they could not find appellant guilty of the child-abuse charge, unless they concluded that her conduct was service discrediting.[9]

In *United States v. Williams, supra,* where the Government failed to establish that the kidnapping took place in a location that was subject to the "special maritime and territorial jurisdiction of the United States," *see* 18 U.S.C. § 7, we nonetheless, upheld the findings of guilty because the court members had been instructed that they must acquit the accused, unless his conduct was service discrediting or contrary to good order and discipline. Certainly Irvin's conduct,

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[9] Apparently, such an instruction often is given in prosecutions under the third clause of Article 134, *see, e.g., United States v. Williams,* 17 M.J. 207 (C.M.A.1984), even though it is superfluous and has the effect of imposing upon the Government a requirement that would be unnecessary for conviction. However, in some instances it enables salvaging convictions that might otherwise be set aside. *See, e.g., United States v. Williams, supra.*

as alleged in the child-abuse charge, could properly be considered service discrediting. In that event, the maximum punishment authorized would appear to be that which is allowed for the "closely related" offenses of assault on a child or, where grievous bodily harm is intentionally inflicted, the punishment authorized for that offense. *See* para. 127*c* (1), Manual, *supra*.

If, under the circumstances of this case, we affirmed the conviction of child abuse because it was service-discrediting conduct, an obvious problem of multiplicity arises: the child abuse consisted of assaults, but the court-martial found appellant guilty of those assaults under a separate charge. Although the child-abuse specification alleges that as a result of Irvin's misconduct the child suffered serious bodily injury and death, these allegations – which do not appear in the assault specification – do not eliminate the multiplicity problem. Instead, it would appear that if we upheld the child-abuse charge because it alleges service-discrediting conduct, then the charge of assault should be dismissed because it is included within the child-abuse allegations and proof.

IV

In examining the extensive post-trial review, we have noticed this comment by the staff judge advocate:

> In my opinion the evidence is *not* sufficient to support a finding that the accused assaulted the child prior to 12 December 1979. There was testimony of prior bruises and injuries but no evidence to indicate that they were the result of a nonaccidental trauma or an assault by the accused. Some or all of the bruises or injuries could have been the result of accidents suffered by the child, disciplining by Sgt. Irvin, the accused's husband, or a number of other people having contact with the child.

(Emphasis added.) Thus, instead of assaults "at divers times," as alleged, the Government – according to the staff judge advocate's review – had only established the occurrence of assaults on December 12, which was (a) the date on which Margaret received her fatal injuries and was taken to the hospital; (b) the date alleged in the murder charge, and (c) the terminal date for the assaults and child abuse, as alleged in those other charges.

The review does not state an opinion about whether appellant was guilty of child abuse at any time prior to December 12. However, because the proven child abuse consisted only of assaults, it would be difficult to see how the evidence – which was insufficient to prove that any assault had occurred before December 12 – sufficed to show child abuse prior to that date.

In effect, the staff judge advocate's review concludes that the Government's evidence was sufficient only to establish misconduct on December 12, 1979. Nonetheless, the review did not recommend that the convening authority disapprove any part of the court-martial's findings that, "at divers times from on or about 18 October 1979 to on or about 12 December 1979," appellant had struck and abused the child. Instead, the staff judge advocate rendered the opinion that "[t]he findings are in proper form"; and presumably the convening authority accepted that opinion, for he approved the findings. *See United States v. Martinez*, 1 M.J. 280, 281 (C.M.A.1976).

If the staff judge advocate's analysis of evidential sufficiency is accepted, then further remedial action would be required as to the findings. Appellant has been convicted of involuntary manslaughter committed by means of a fatal assault which occurred on December 12. If the child abuse consisted solely of assaults and no assaults occurred prior to December 12, then it would appear that the findings of guilty as to involuntary manslaughter would encompass the other offenses.[10]

V

We have considered the record of trial in light of the other issue (*see* n. 5, *supra*) to determine whether any errors in the reception of evidence might have affected the findings of

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[10] The child-abuse specification alleges both intent and negligence; but even if those somewhat contradictory allegations were construed to encompass intentional infliction of great bodily harm, it would appear that the court members did not find that this intent existed on December 12. Otherwise, presumably they would have convicted appellant of murder. *Cf. United States v. Varraso*, 21 M.J. 129 (C.M.A.1985.) Accordingly, if the evidence did not suffice to establish any assaults prior to December 12, it would signify that it did not establish the intentional infliction of any serious injury either.

guilty. We are convinced that no taint exists. To supplement circumstantial evidence, the prosecution offered extensive medical testimony; but any excessive liberality on the judge's part in admitting this testimony was not prejudicial to appellant. The basic fact established by the doctors was that the child received fatal injuries which could not have been inflicted except by appellant, who was in charge of her at the time. The medical testimony made clear that the circumstantial evidence was inconsistent with any explanation of the child's injuries and death other than an assault and battery perpetrated on her by appellant.

VI

The military judge instructed the court members that the maximum punishment for Irvin's offenses included 16 years' confinement. The Court of Military Review disagreed with this advice because it concluded that, under the findings, only 1 year's confinement was authorized for the child abuse, rather than the 8 years assigned to that offense by the judge. Appellant had already received some relief. 13 M.J. at 755. We believe that now, in fairness to appellant, the Court of Military Review should reexamine the findings and determine what remedial action should be taken as to the findings in light of the matters discussed in this opinion. Then, they should reassess the sentence in light of that remedial action. However, we wish to make it perfectly clear that in this case we are not ruling that any change in the sentence is necessary, *cf. United States v. Suzuki,* 20 M.J. 248 (C.M.A.1985); and we are not holding that the sentence in its present form would be inappropriate, even if the court below concludes that only the conviction of involuntary manslaughter should be sustained.

VII

The decision of the United States Air Force Court of Military Review is set aside. The record of trial is returned to the Judge Advocate General of the Air Force for submission

to that court for further review under Article 66, UCMJ, 10 U.S.C. § 866.

COX, Judge (concurring):

I agree with the disposition of the charge under the Assimilative Crimes Act because trial counsel failed to prove the essential element of jurisdiction.*

I also agree that the military judge could have taken judicial notice of the fact of jurisdiction under Mil.R.Evid. 201, if otherwise appropriate under the rules.

I am also concerned by the staff judge advocate's comments about the sufficiency of the evidence. If the evidence is sufficient only to prove the fatal assault of December 12, then, as noted in the principal opinion, only the homicide charge can survive. That would be analogous to a charge of assault with intent to commit murder and a charge of the resulting homicide. The former is clearly lesser-included in the latter.

However, notwithstanding the staff judge advocate's review, my reading of the record convinces me that the Government proved its case of multiple assaults over a long period of time. It is, of course, a classic circumstantial-evidence case, as are practically all cases of child abuse (in this case, the multiple assaults, Additional Charge II). The record shows that appellant had the opportunity, the inclination, and the present ability to commit the assaults. The testimony and the photographs convince me that this child was battered, assaulted, beaten, and bruised over a long period of time and that the fatal blow was separate and distinct from the older, equally brutal and vicious blows.

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* In light of the posture of the litigation and the motion by appellant at trial to dismiss the charge, it is easy to conclude that this was never at issue and was waived. It was raised for the first time on appeal. When counsel attack jurisdiction for the first time on appeal, we should require that appellant allege that there was no jurisdiction. Then, we could review the record to examine whether there is a basis for the allegation. However, because the sentence as approved is within the statutory maximum for the infanticide, the issue is moot. In all likelihood, the assimilated charge was multiplicious with the assault and battery charge as the proof developed.

I do agree with the remand to the Court of Military Review for a new look at the evidence in light of the staff judge advocate's review. And it is never inappropriate for the Court of Military Review to reconsider a sentence if appellate review has altered the posture of the case. As stated in the principal opinion, this does not require a change in the sentence but permits it.

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 44221/AF
CMR Dkt. No. 23269

UNITED STATES, APPELLEE,

v.

GLORIA A. IRVIN APPELLANT,

ORDER

In our initial opinion in the above-entitled case we concluded that appellant's conviction "under the Assimilative Crimes Act [18 U.S.C. § 13 (Additional Charge I)] could not be affirmed." *United States v. Irvin,* 21 M.J. 184, 187 (C.M.A. 1986). However, as a result of an issue which was raised questioning the sufficiency of the evidence as to Additional Charge II, we directed that the record of trial be returned to the United States Air Force Court of Military Review for further consideration. That court has now dismissed Additional Charge II and its specification. ___ M.J. ___ (1986). Thereafter, the record of trial was returned to this Court. We will now dispose of Additional Charge I as indicated by our previous opinion. No further action regarding the sentence is required. Accordingly, it is, by the Court, this 9th day of June 1986,

ORDERED

That the decision of the United States Air Force Court of Military Review regarding the Charge and its specification and the sentence is affirmed; and

That the findings of guilty of Additional Charge I and its specification are set aside; and that Charge and its specification are dismissed.

For the Court,

/s/ JOHN A. CUTTS, II
John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (SULLIVAN)
Appellate Government Counsel (KISTLER)

APPENDIX C

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 23269

UNITED STATES, APPELLEE,

v.

SENIOR AIRMAN GLORIA A. IRVIN, FR 262-11-9690
UNITED STATES AIR FORCE

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14 MAY 1982

Sentence adjudged 21 December 1980 by GCM convened at Lowry Air Force Base, Colorado. Military Judge: Roger L. Holte.

Approved sentence: Dishonorable discharge, confinement at hard labor for four (4) years, forfeiture of three hundred and thirty-four dollars ($334.00) per month for four (4) years and reduction to airman basic.

Appellate Counsel for the Accused: Colonel George R. Stevens and Major Alexander S. Nicholas. Appellate Counsel for the United States: Colonel James P. Porter, Major George D. Cato and Lieutenant Colonel William H. Seckinger, USAFR.

Before MILES, KASTL AND RAICHLE, Appellate Military Judges

DECISION

MILES, Senior Judge:

Contrary to her pleas, the accused was convicted by general court-martial of involuntary manslaughter,[1] assault and battery on a child under the age of 16 and child abuse,[2] in violation of Articles 119, 128 and 134 of the Uniform Code of Military Justice [hereinafter U.C.M.J.]. The approved sentence extends to a dishonorable discharge, confinement at hard labor for four years, forfeiture of $334.00 per month for four years and reduction to airman basic.

I. FACTS

Margaret Cox, the decedent, was born on 9 November 1977 and died on 14 December 1979. On 18 October 1979, the Denver Department of Social Services placed her for adoption in the home of Sergeant Charles Irvin and his wife, the accused, who resided on Lowry Air Force Base, Colorado. The evidence established that Margaret Cox was a normal, healthy, happy infant with no particular health or development problems.

During various conversations from 18 October 1979 to 12 December 1979, the accused told a Denver social services worker that she was having problems toilet training Margaret. During this same period, Mrs. Sheila Gray, a baby sitter, who regularly took care of Margaret during the day, noticed various bruises on her especially a black eye, a bruise above the naval, and a bruise on her right ear. Other persons who saw Margaret during this period observed bruises and marks on her. However, by 12 December these bruises had healed except for a bruise on the left eyebrow. On 11 December 1979, the child complained of a headache to Mrs. Gray, but on the next day she seemed to be fine.

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[1] She was charged with unpremeditated murder but convicted of the lesser included offense of involuntary manslaughter as a result of assault and battery.

[2] This was tried as a violation of Article 134, Uniform Code of Military Justice, as a noncapital federal offense, pursuant to 18 U.S.C. §13 (1976), Assimilative Crimes Act, incorporating Section 18-6-401, Colorado Revised Statutes, 1973, as amended.

At approximately 1630 hours on 12 December, the accused picked up Margaret from the babysitter. At that time, she was normal, unbruised (except as noted) and uninjured. Shortly before 1800 hours, the accused, with Margaret in her arms, returned to Mrs. Gray's quarters and told her husband, Sergeant Gray, that Margaret was very sick and had choked on something while eating. Sergeant Gray noticed that the child was limp, breathed erratically, appeared unconscious and had a fresh bruise on her collar bone and splotches on her face. The accused left Margaret with Sergeant Gray, returned to her quarters briefly, and then drove Margaret to the Lowry Air Force Base clinic at the suggestion of Sergeant Gray.

At approximately 1805 hours, the accused arrived at the Air Force clinic. Upon arrival, Margaret was unconscious, her eyes were fixed and her pupils were dilated and she was in respiratory distress. She had extensive bruises on her body including some on the left shoulder area, on the right thigh, above the left eyebrow, and lacerations on her lips; and there was blood in her mouth and throat which had to be suctioned out. On the back of her head at the occipital region of the skull, there was a massive subdural hematoma – a large fluid-filled bruise. Her blood pressure was unreadable and pulse shallow.

After five minutes, the medical technicians determined that Margaret's condition was critical and required immediate hospitalization and extensive medical treatment. She was taken to a nearby civilian hospital by ambulance, arriving at approximately 1820 hours. Upon arrival, Margaret remained unconscious, had an abnormal respiratory pattern, and dilated pupils. She did not respond to any stimulus. Various bruises and contusions were noted on her body including her forehead, both eyes, left shoulder, right thigh and left leg and above her pubic area.

Later that evening, Margaret was transferred to another civilian hospital due to the availability of a Computerized Axial Tomography (CAT) scanner, to determine the exact nature of injuries to her head. After two days and despite extensive treatment, Margaret's condition continued to deteriorate. The initial neurological examination revealed no

brain stem function and only minimal spinal cord reflexes. Eventually, even those reflexes disappeared. On 14 December 1979, Margaret's respirator was disconnected due to brain death and she was declared dead.

The medical evidence in this case was extensive. Fourteen physicians testified for the prosecution. Nine of these had treated and examined Margaret. They included two neurological surgeons, a pediatric neurologist, a board-certified specialist in emergency medicine, and several certified pediatricians. Additionally, two pathologists testified for the prosecution, one of whom performed the autopsy on Margaret Cox. Other evidence supported the prosecution's case including the testimony of various nurses and medical technicians and extensive documentary evidence. The latter included numerous photographs of the decedent taken around 1930 hours on 12 December, in the early morning of 13 December and at the autopsy. Other evidence was taken from the accused's quarters and a videotape of the quarters was admitted at trial.

All of this evidence – overwhelming and massive as it is – established clearly that Margaret Cox received the highest degree of professional medical care and treatment from the time she was initially taken to the Lowry clinic to the time of her death. Contrary to defense claims at trial, it also established that she had extensive bruises and contusions over her body at the inception of this medical treatment. These bruises included a series of five, on the forehead, extensive bruises over most of the right thigh, a massive bruise over the occipital portion of the skull, bruises on the left shoulder and the right lower leg, and above the pubic area. Although this was not the complete extent of the bruises, other bruises could not be conclusively established as predating her medical treatment.

The autopsy established the cause of death as severe brain injuries caused by massive hemorrhaging and a skull fracture of the occipital portion. Because of protection from adjoining muscle tissue, a strong force is required to fracture this part of the skull. A CAT Scan X-ray also confirmed the skull fracture. It was clearly and convincingly established that these head injuries also preceded any medical treatment given to Margaret.

At the trial, the accused did not testify. However, numerous statements that she made as to the cause of Margaret's injuries to medical personnel and others were admitted into evidence. Although varying in detail, essentially the accused claimed that Margaret had been eating in the kitchen while sitting in a boosterchair and the accused was out of the room. After she heard a crash, the accused rushed back to the kitchen and Margaret had apparently fallen out of the booster chair. Margaret allegedly was standing after the fall, then later vomited and became unconscious. These statements varied in detail and conflicted with her claim to Sergeant Gray that Margaret's breathing difficulties occurred when she choked while eating.

II. Conclusions on Evidence

All of this evidence, including the testimony of the physicians presented by the prosecution, established that Margaret's injuries – because of their type, location and nature – could not have resulted from accidental causes. For example, the injuries to Margaret's head could only have resulted from repeated trauma to the head and could not have resulted from a single fall of three or four feet. Other medical indications, such as retinal hemorrhaging and retinal detachment observed by several of her treating physicians, were strong indicators of nonaccidental causation.

In their testimony, several physicians testified that Margaret's injuries were consistent with a diagnosis of repeated nonaccidental trauma to a child by persons having custody or control over her. Their answers were phrased in this manner, at the military judge's request, to insure their testimony did not usurp any jury functions in deciding the case.

We conclude that the evidence at trial established beyond a reasonable doubt the nonaccidental nature of the injuries and death suffered by Margaret Cox at the hands of the accused. Supporting this conclusion is the medical evidence previously mentioned as well as other circumstantial evidence. This included admissions the accused made that she had disciplined the child with a comb, her statements concerning the diffi-

culty of potty training Margaret and the detailed evidence concerning the search of accused's quarters conducted after Margaret's admission to the hospital, particularly the fact that the kitchen was undisturbed and clean. Her guilt was compellingly established because the victim was in the accused's exclusive custody during a brief hour and one half period; no one else was shown to have been in the child's presence during the time;[3] and the victim's injuries and death were not accidentally caused and could not have occurred in the manner suggested in the accused's pretrial statements.

III. Battered Child Syndrome

In their initial assignment of error, appellate defense counsel assert the military judge erred by permitting physicians' testimony amounting to ultimate legal conclusions under the guise of medical diagnosis and that no proper foundation was laid for such evidence. We find no merit in either claim.

The applicable Military Rules of Evidence recognize that if scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or determining issues, then an expert may testify in the form of an opinion or otherwise concerning that specialized knowledge. Mil.R.Evid. 702. Mil.R.Evid. 704 specifically provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Contrary to defense claims the "battered child syndrome" is a recognized medical diagnosis.[4] For over a decade, trial courts have recognized the battered child syndrome as a

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[3] The evidence at trial established that the accused's husband was *not* in the quarters during the period from 1600 to 1650 hours and from approximately 1710 hours to well after the child was taken to the Lowry AFB clinic. There is some evidence to suggest the accused's husband might have been in the quarters for a brief period from 1650 to 1710 hours to change clothes.

[4] Plaine, "Evidentiary Problems in Criminal Child Abuse Prosecutions," 63 Geo. L.J. 257, 272 (1974); Brown, Fox and Hubbard, "Medical and Legal Aspects of Battered Child Syndrome," 50 Chi.-Kent L.Rev. 45 (1973); McCoid; "The Battered Child and Other Assaults on the Family," Part One, 50 Minn. L. Rev. 1, 3-19 (1965).

legally qualified diagnosis. *People v. Jackson*, 18 Cal. App.3d 504, at 507-8, 95 Cal. Rptr. 919, 921 (4th Dist. Ct. App. 1971). *Accord: Landeros v. Flood*, 17 Cal.3d 399, 131 Cal. Rptr. 69, 551 P.2d 389 (1976).

In *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978), the Supreme Court of North Carolina recognized the admissibility of expert testimony about the battered child syndrome and its application to particular facts. The test for the admissibility of such opinion evidence is whether the "opinion required expert skill or knowledge in the medical or pathologic field about which a person of ordinary experience would not be capable of satisfactory conclusions, unaided from expert information by one learned in the medical profession." *State v. Wilkerson, supra,* 247 S.E.2d at 911.

Other courts have similarly upheld the admission of expert medical testimony describing the battered child syndrome and relating it to the injuries in a particular case. *See State v. Loss*, 295 Minn. 271, 204 N.W.2d 404 (1973); *State v. Best*, 232 N.W.2d 447 (S.D. 1975); *People v. Henson*, 33 N.Y.2d 63, 304 N.E.2d 358 (1973). Annot., 98 A.L.R.3d 306 (1980); *See also*, Annot., 97 A.L.R.3d 338 (1980).

The opinion testimony in this case was well within the bounds of admissibility. The testimony about the "battered child syndrome" was not the central feature of any testimony; rather, the case centered directly on the injuries and proof they could not have resulted from accidental trauma. We find the testimony of the physicians, as expert witnesses, was of considerable assistance to the fact finders in view of the highly technical nature of this medical evidence. It did not in any way usurp the function of the members in ultimately deciding both the cause of the injuries and the accused's criminal responsibility therefor. Such testimony was clearly admissible under Mil.R.Evid. 702 and 704.

Contrary to further claims of appellate defense counsel, none of the physicians testified that the accused caused Margaret's injuries and death. Their evidence only established without any question the nonaccidental nature of the injuries. The accused's guilt was established from the com-

pelling evidence placing Margaret in her custody during the one and one half hours that these injuries were inflicted.[5]

We also reject the related defense objection to the reliance by some of the expert witnesses on various learned and scholarly articles on child abuse and injuries to children from falls. Mil.R.Evid. 803(18).

IV. ASSIMILATIVE CRIMES ACT

Appellate defense counsel assert several errors relating to accused's conviction under 18 U.S.C. § 13 (Assimilative Crimes Act) for child abuse. They claim: (a) the prosecution failed to establish federal criminal jurisdiction; (b) the child abuse offense is preempted by other Articles of the U.C.M.J.; (c) the military judge erred in admitting into evidence a copy of the Colorado child abuse statute; and (d) the maximum punishment should have been less than sixteen years. We disagree with the first two assigned errors, but agree with the last two in part.

Appellate defense counsel claims now that the prosecution did not prove federal criminal jurisdiction over Lowry Air Force Base, Colorado, at trial. We disagree.

The Assimilative Crimes Act, 18 U.S.C. § 13 (1976) applies only to areas of exclusive or concurrent federal criminal jurisdiction. Manual for Courts-Martial, 1969 (Rev.), paragraph 213*e*(2). The need to establish such jurisdiction is well recognized. *United States v. Perry*, 12 M.J. 112 (C.M.A. 1981). This is frequently done by stipulation or judicial notice. *United States v. Rowe*, 13 U.S.C.M.A. 302, 32 C.M.R. 302 (1962); *United States v. Perry, supra. See also* Air Force Pamphlet 110-3, Civil Law, paragraph 15-5, 17 May 1976.

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[5] As the California Court of Appeals noted: "In other words, the 'battered child syndrome' simply indicates that a child found with the type of injuries outlined above has not suffered those injuries by accidental means. This conclusion is based upon an extensive study of the subject by medical science. The additional finding that the injuries were probably occasioned by someone who is ostensibly caring for the child is simply a conclusion based upon logic and reason. *People v. Jackson*, 95 Cal.Rptr. 919, at 921. (Ct. App. 4th Cir. 1971) *Accord. State v. Wilkerson, supra.*

At trial, the military judge did not *specifically* take judicial notice of Lowry Air Force Base as an area of exclusive federal jurisdiction – nor was he asked to do so. In responding to defense argument on appeal, appellate Government counsel now ask us to take judicial notice of this fact.[6] We decline to do so, finding it unnecessary.[7]

At trial, the participants fully recognized the exclusive federal criminal jurisdiction over the situs of the offenses on Lowry Air Force Base; by implication, judicial notice was taken.[8] In fact, the trial defense counsel specifically conceded that the state of Colorado was without jurisdiction to try the offenses charged. Having conceded the specific applicability of the Assimilative Crimes Act at trial, the defense cannot now claim for the first time on appeal the reverse of that position. The assignment of error is without merit. *See United States v. Piggie,* 622 F.2d 486 (10th Cir. 1980), *cert. denied,* 449 U.S. 863 (1980); *United States v. Lavender,* 602 F.2d 639 (4th Cir. 1979); *Canal Zone v. Burjan,* 596 F.2d 690 (5th Cir. 1979); *United States v. Hughes,* 542 F.2d 246 (5th Cir. 1976).

On a related issue, appellate defense counsel urge that the military judge erred by denying a defense motion to dismiss the child abuse offense because of its preemption by other Articles of the U.C.M.J. We disagree. In our view, Congress did not intend to limit prosecution of child abuse offenses to assaults under Article 128, U.C.M.J., and the charged offense is not a residuum of elements of a specified offense. *United States v. Wright,* 5 M.J. 106 (C.M.A. 1978); *United States v. Norris,* 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953). *See United States v. Brown,* 608 F.2d 551 (5th Cir. 1979).

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[6] The Government's REPLY BRIEF, dated 12 March 1982.

[7] The Military Rules of Evidence, like the Federal Rules of Evidence, recognize the possibility of judicial notice on appeal. Mil.R.Evid. 201(f). However, federal courts in criminal cases show great reluctance to do so if the result is to establish an element of an offense not proved below. *See Garner v. Louisiana,* 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961); *United States v. Bliss,* 642 F.2d 390 (10th Cir. 1981); *United States v. Jones.* 580 F.2d 219 (6th Cir. 1978); *United States v. Burroughs,* 564 F.2d 1111 (4th Cir. 1977). Annot., 49 A.L.R. Fed. 911 (1980).

[8] Appellate Exhibits XII and XIII.

Appellate defense counsel claim that the military judge erred by admitting into evidence a copy of the Colorado child abuse statute. We agree. The statute did contain irrelevant and possibly misleading matter. The reasons prompting its admission would have been better served by a more explicit acknowledgment, through judicial notice, of the exclusive federal criminal jurisdiction over Lowry Air Force Base and the relevancy of the Assimilative Crimes Act.[9] Moreoever, the military judge is the sole source of the law and reference by the members to outside sources, even as evidence, is prohibited. *See, United States v. Boswell,* 8 U.S.C.M.A. 145, 23 C.M.R. 369 (1957); *United States v. Rinehart,* 8 U.S.C.M.A. 402, 24 C.M.R. 212 (1957). Yet, we are convinced beyond a reasonable doubt the error was harmless and had no impact on the findings in view of the compelling evidence of guilt. Any impact on sentence has been considered in our reassessment.

We also agree with the appellate defense counsel's claim that the maximum period of confinement should have been less than sixteen years. The maximum punishment for child abuse in Colorado is normally one year, but if serious bodily injury results, the punishment can be eight years. *See* Colorado Revised Statutes §§ 18-6-401 (7); 18-1-105; 18-1-106. The military judge ruled correctly when he found the Colorado law supplied the maximum. *See* 18 U.S.C. § 13 (1976); *United States v. Picotte,* 12 U.S.C.M.A. 196, 30 C.M.R. 196 (1961). Yet, he went too far in attempting to use a theoretical possibility of doubling the maximum under Colorado law to justify a sixteen year maximum. This conclusion is supported by the inherent complexity of the Colorado statute requiring procedures which could not be followed by courts-martial; the fact that the "aggravating circumstances" were an element of the multiplicious manslaughter offense; and the need to strictly construe penal provisions.[10] As the Supreme Court of the United States has recognized, the Assimilative Crimes Act is a method of punishing a crime committed on a federal reservation "only in the way *and to the extent* that it would

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[9] *Supra* Note 7.

[10] *See United States v. Guilbault,* 6 M.J. 20 (C.M.A. 1978); *United States v. Baker,* 18 U.S.C.M.A. 504, 40 C.M.R. 216 (1969).

have been punishable if the territory embraced by the reservation remained subject to the jurisdiction of the state." [Emphasis added]. *United States v. Press Publishing Co.*, 119 U.S. 1, 10, 31 S.Ct. 212, 55 L.Ed. 65 (1911). *See United States v. Dunn*, 545 F.2d 1281 (10th Cir. 1976). We will cure this error by reassessing the sentence.

V. REMAINING ERRORS

We have considered the remaining assignments of error by appellate defense counsel, as well as those specified by the accused in two separate requests for appellate representation, and have resolved them adversely to the accused.[11] One of these issues concerned the prosecution's inadvertent failure to disclose an oral statement by some unknown person at Margaret's funeral.[12] Having read the record of trial, we are absolutely convinced this material did not create a reasonable doubt as to accused's guilt and was of no material significance in view of the compelling evidence thereof. *See United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1977); *United States v. Horsey*, 6 M.J. 112 (C.M.A. 1979).

Reassessing the sentence in light of the modified maximum punishment and the entire record, we find appropriate only so much of the sentence as provides for a dishonorable discharge, confinement at hard labor for three years, forfeiture of $334.00 per month for four years and reduction to airman basic.

The findings of guilty and the sentence as modified are AFFIRMED.

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[11] Appellate Defense Counsel's MOTION FOR LEAVE TO FILE DOCUMENT (Revised Air Force Form 304, dated 29 December 1981), SUPPLEMENTAL ASSIGNMENT OF ERROR, AND ADDITIONAL CITATION OF AUTHORITY, dated 24 March 1982, is granted.

[12] As told to the prosecutor before trial, the witness heard an unknown voice at the close of the funeral say "Oh my God, I killed her." The witness did not know or even see who made the statement, could not identify who was near the area where the sound came from, and could not even positively identify the gender of the voice. Efforts by the prosecution to discover more about this failed. The evidence at the subsequent hearing suggests the accused was well aware of anything said.

RAICHLE, Judge, concurs.

KASTL, Judge, dissenting:

I approve the disposition of issues in the well-reasoned majority opinion. However, I would remand for a new trial based upon another assignment of error, not addressed therein.

Following trial, the convening authority ordered a limited hearing under *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967) concerning a potentially inculpatory statement overheard at the deceased child's funeral. During the hearing, Dr. Pamela McBog testified that she had heard an unknown black man at the funeral utter "Oh, my God, I killed her, I killed her" or similar words. The military judge found that: (a) Dr. McBog had advised the prosecution of this matter prior to the accused's trial; (b) the prosecution did not disclose the statement to the defense prior to trial; and (c) the nondisclosure was not due to any intentional self serving or malicious reason.

Constitutional Due Process

The United States Supreme Court has considered whether prosecution suppression of evidence favorable to an accused violates due process in *United States v. Augurs*, 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976), and *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963). Without elaborating on the nuances of a complex subject, the relevant portions of *Brady* and *Augurs* counsel that:

(1) If the suppressed evidence is material, it matters not that the prosecution acted in good faith.[1]

(2) The question of whether a given piece of evidence is material can be relevant as to findings, sentence, or both.[2]

(3) Sometimes, evidence is obviously of such substantial value to the defense that elementary fairness requires disclosure—even without specific request. In determining whether prosecution *suppression* of evidence results in con-

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[1] *Brady v. Maryland*, 373 U.S. 83, 87, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).

[2] *Brady v. Maryland, supra*, at 88, 90-91.

stitutional error, the accused should not have to satisfy the same severe burden he carries in a motion for a new trial – i.e., that newly discovered evidence probably would have resulted in an acquittal.[3]

(4) The proper standard is this: If the omitted evidence creates a reasonable doubt that did not otherwise exist, "constitutional error has been committed."[4]

Courts have applied these difficult concepts with varying results. See, for example, *Stokes v. State*, ____ Del. ____ 402 A.2d 376, 379-381 (1979) (particularly excellent analysis of cases); *People v. Torez*, 90 Mich. App. 120, 282 N.W.2d 252 (1979); and *Jackson v. Wainwright*, 390 F.2d 288, 294-297 (5th Cir. 1968). *See generally*, Annot., 34 ALR3d 16 (1970). The Court of Military Appeals has applied *Brady* and *Agurs* in *United States v. Horsey*, 6 M.J. 112 (C.M.A. 1979). The Court suggests that the proper reading of the *Brady* and *Agurs* test is:

> The evidence must be highly probative of the innocence of the accused in more than an isolated way.

United States v. Horsey, supra, at 115.

Military Discovery

Over and above the constitutional due process issue, there is an additional consideration – the unusually liberal discovery practices enshrined in military law. Thus, military practice well may require a standard more forthcoming than *Brady* and *Agurs*. Information available to a military accused normally exceeds that obtained by defendants in almost all state and federal courts. H. Moyer, Justice and the Military 437 (1972). *See also United States v. Brakefield*, 43 C.M.R. 828, 833 (A.C.M.R. 1971). Summarizing, Moyer comments that:

> As a matter of practice, discovery in courts-martial is generally open-ended and informal, and material is often furnished even though not specifically required under the [Manual for Courts-Martial] . . . . Moyer, *supra*, at 444.

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[3] *United States v. Agurs*, 427 U.S. 97, 110-111, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976).

[4] *Agurs, supra*, at 112-113 see also Fn. 22.

Apropos of this standard, paragraph 44*g*, Manual for Courts-Martial, 1969 (Rev.), sets forth duties of the trial counsel during the trial. The paragraph addresses the prosecutor's role thus:

> Although his primary duty is to prosecute, any act, such as the conscious suppression of evidence favorable to the defense, inconsistent with a genuine desire to have the whole truth revealed, is prohibited.

See United States v. Croft, 33 C.MR. 856, 860 (A.F.B.R. 1963). *See generally*, DA Pam 27-173, Military Justice – Trial Procedure, paragraph 19-14, April 1971. (Disclosure "should be construed liberally within the spirit of ethical standards.")[5]

Conclusion

This case has taken on a new slant with the matters presented at the *DuBay* hearing. As I understand their position, the defense claims:

a. the prosecution learned of a potentially inculpatory statement at the deceased's funeral which amounted to someone else "confessing" to the crime;

b. the prosecution failed to inform the defense of this;

c. the defense thus never had a chance to explore the inculpating statement;[6] and

d. this situation is squarely within the Supreme Court's comment in *Agurs* that "there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed. . . ." *United States v. Agurs, supra*, at 110.

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[5] Overlaying both the constitutional and military discovery aspects of the problem is the matter of ethical standards. The prosecutor must reveal evidence tending to negate the guilt of the accused, or mitigate the degree of the offense, or reduce the punishment. *See* Disciplinary Rule 7-102(b); *see generally, Spilker*, The Ethical Charge to Counsel, 22 Air Force L. Rev. 101, 112-113 (1980-1981).

[6] One cannot easily say that both sides had "equal access" to the witness on this matter – she was expected to testify solely as a medical expert; only a psychic "hunch" could have led the defense to ask whether she had attended her patient's funeral and overheard exculpatory matters of possible value to the accused.

In my judgment, this factual situation comes tantalizingly close to meeting the *Brady-Agurs* test.[7] Even if the facts technically do not meet that threshold, the liberal procedures of military discovery nonetheless mandate a new trial since the accused was denied the broad and traditional discovery routinely recognized in the military. See DA Pam 27-173, Military Justice–Trial Procedure paragraph 19-14, April 1971.

On this basis I would remand for a new trial.

OFFICIAL

/s/ Richard F. Whitney

Richard F. Whitney
Major, USAF
Chief Commissioner

[7] During the entire trial for example, the accused's husband also an airman, claimed his rights under Article 31, Uniform Code of Military Justice. His alibi for the timeframe in question is not airtight and there is some suggestion he may have been present in the quarters at a time near the child's death, changing clothes before beginning his outside job as a janitor. Granting the accused the benefit of all inferences, the suppressed evidence creates in my mind a reasonable doubt on the issues of guilt and sentence–particularly as to the degree of the accused's culpability as being solely responsible for death, child abuse, and the other assaults.

APPENDIX D

UNITED STATES AIR FORCE COURT
OF MILITARY REVIEW

ACM 23269 (f rev)

UNITED STATES

v.

SENIOR AIRMAN GLORIA A. IRVIN, FR 262-11-9690
UNITED STATES AIR FORCE

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17 APRIL 1986.

Sentence adjudged 21 December 1980 by GCM convened at Lowry Air Force Base, Colorado. Military Judge: Roger L. Holte.

Approved sentence: Dishonorable discharge, confinement at hard labor for four (4) years, forfeiture of three hundred thirty-four dollars ($334.00) per month for four (4) years and reduction to airman basic.

Appellate Counsel for the Accused: Colonel George R. Stevens, Lieutenant Colonel Michael D. Wims, Major Alexander A. Nicholas and Captain John V. Sullivan, USAFR. Appellate Counsel for the United States: Colonel Kenneth R. Rengert, Major George D. Cato, Captain Joseph S. Kistler and Lieutenant Colonel William H. Seckinger, USAFR.

Before FORAY, MURDOCK and O'HAIR Appellate Military Judges

DECISION UPON FURTHER REVIEW

PER CURIAM:

This case is again before us for review.

On 20 December 1980, the appellant was found guilty by a general court-martial, with members, of involuntary

manslaughter, child abuse,[1] and assault consummated by a battery, in violation of Articles 119, 128 and 134, U.C.M.J. The victim of the offenses was a two year old girl entrusted to the care of appellant and her husband for the purpose of adoption by the Denver Department of Social Services. The approved sentence in the case extends to a dishonorable discharge, confinement at hard labor for four years, forfeiture of $334.00 per month for four years, and reduction to the grade of airman basic.

In our original decision,[2] dated 14 May 1982, this Court affirmed the findings of guilty but modified the approved sentence and affirmed only so much of it as provided for dishonorable discharge, confinement at hard labor for three years, forfeiture of $334.00 per month for four years, and reduction to airman basic.

Appellant petitioned the Court of Military Appeals for a grant of review of this Court's decision on 3 August 1982, and her petition was granted by that Court on 12 November 1982.

The Court of Military Appeals announced its decision in this case on 13 January 1986. *United States v. Irvin,* 21 M.J. 184 (C.M.A. 1986). That Court found that the finding of guilty of child abuse offense alleged in Additional Charge I as a violation of the Assimilative Crimes Act cannot stand. In addition, the Court noted the following comment in the post-trial review of the staff judge advocate:

> In my opinion the evidence is *not* sufficient to support a finding that the accused assaulted the child prior to 12 December 1979. There was testimony of prior bruises and injuries but no evidence to indicate that they were the result of a nonaccidental trauma or an assault by the accused. Some or all of the bruises or injuries could have been the result of accidents suffered by the child,

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[1] The child abuse offense was alleged as a violation of Section 18-6-401, Colorado Revised Statutes, as amended, as assimilated by the Assimilative Crimes Act, 18 U.S.C. § 13, and incorporated by the "crimes and offenses not capital" clause of Article 134, U.C.M.J.

[2] *United States v. Irvin,* 13 M.J. 749 (A.F.C.M.R. 1982).

> disciplining by Sgt Irvin, the accused's husband, or a number of other people having contact with the child. (Emphasis added.)

The Court went on to say that, in effect, the post-trial review concludes the Government's evidence was insufficient to establish misconduct on the part of appellant prior to 12 December 1979. In spite of this comment, the review did not make any recommendation to the convening authority concerning disapproval of any part of the court-martial's finding that "at divers times from on or about 18 October 1979 to on or about 12 December 1979." appellant had struck and abused the victim. The Court reasoned that:

> If the staff judge advocate's analysis of evidential sufficiency is accepted, then further remedial action would be required as to the findings. Appellant has been convicted of involuntary manslaughter committed by means of a fatal assault which occurred on December 12. If the child abuse consists solely of assaults and no assaults occurred prior to December 12, then it would appear that the findings of guilty as to involuntary manslaughter would encompass the other offenses.

The Court then concluded that, in fairness to appellant, this Court should reexamine the findings and determine what remedial action should be taken with respect to the findings in light of the matters discussed in their opinion. The Court then set aside our original decision in this case and returned the record of trial to The Judge Advocate General for submission to us for further review pursuant to Article 66, U.C.M.J. A mandate in this regard was announced by that Court on 3 February 1986.

Our further review of the evidence introduced at trial pertaining to the offense of assault alleged to have been committed at divers times from on or about 18 October 1979 to on or about 12 December 1979, compels us to conclude that it was insufficient to prove the appellant guilty beyond a reasonable doubt of assaulting the victim at any time prior to 12 December 1979. Although there was evidence to show the existence of bruises and injuries to the child prior to 12 December, we cannot say beyond a reasonable doubt that

they were a result of one or more assaults, and if so, caused by the appellant. The evidence to show the appellant assaulted the child on 12 December 1979, however, is overwhelming and sufficient to prove that offense beyond a reasonable doubt.

The effect of our finding with regard to the offense of assault is that that offense now merges with the offense of involuntary manslaughter. The evidence to show the existence of assaults in both offenses is the same and the offenses are greater and lesser in relation to each other. *United States v. Baker,* 14 M.J. 361 (C.M.A. 1983); *United States v. Zubko,* 18 M.J. 378 (C.M.A. 1984). The remedy available to cure this multiplication of charges is to dismiss the lesser included offense. *United States v. Zupancic,* 18 M.J. 387 (C.M.A. 1984); *United States v. Zubko, supra.* Accordingly, the findings of guilty of Additional Charge II and its specification are set aside and dismissed.

Reassessing the sentence based upon the remaining affirmed finding of guilty of involuntary manslaughter we find the sentence as affirmed by this Court in its original decision to be entirely appropriate and affirm it once again.

Pursuant to the mandate of the Court of Military Appeals, the record of trial is returned to The Judge Advocate General for submission to that Court for final disposition.

OFFICIAL:

/s/ FELIX LANDAU
Felix Landau
Captain, USAF
Chief Commissioner

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